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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 548

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INDEPENDENT UNION OF GEAR WORKERS,
Respondent.

BRIEF FOR RESPONDENT INDEPENDENT UNION OF GEAR WORKERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION TO REVERSE WITHOUT ORAL ARGUMENT.

BENJAMIN WHAM,
Attorney for Respondent.

November 22, 1940.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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I.

Important Facts Were Ignored by the Board.

Petitioner, on page 20, states that the Court below in its opinion failed "to mention major findings of the Board" and omitted "important evidence supporting other findings," and treated "certain lines of evidence, contrary to testimony which the Board found persuasive, as if such evidence stood undisputed."

One difficulty with the Petitioner's position is that it did this very thing in its decision and order. We refer particularly to the fact that the Petitioner cavalierly brushed aside the testimony and exhibits introduced by

the Independent showing that it is a live, active and vigorous labor organization and that for three and one-half years it has fully represented the employees in the Chicago plant of Foote Bros. Gear and Machine Corporation, and that it is the choice of well over a majority of the employees as a collective bargaining agent.

The following are some of the important facts ignored by the Board in whole or in part:

1. **Formation of Independent Union of Gear Workers.**

The Board's garbled account of the Independent's organization requires a correct summary of it.

The Independent Union of Gear Workers was formed after the National Labor Relations Act was declared to apply to manufacturing companies by the decision in the Jones-Laughlin case decided by the Supreme Court of the United States April 12, 1937. The Independent Union of Gear Workers had no existence prior to that time. The Board would make it appear that it was an outgrowth of the old plan of employee representation or N. R. A. union in use at the plant previously. There was no connection between the two. After the Supreme Court decision made the legality of the N. R. A. union questionable, the majority of the employees formed and joined the Independent Union of Gear Workers, as they were permitted to do by Section 7 of the National Labor Relations Act. Its organization came about in the following manner:

On May 6, 1937, the representatives of the N. R. A. union, having requested a meeting with the management, were informed that the management would not deal with them because there was doubt as to the legality of their organization. It was suggested that they confer with a lawyer (R. 277-8, 931-2).[1]

1. References are to the printed "Summary".

Carl Egner was chairman of the N. R. A. union. He and the other representatives, after the above conference with the management, talked things over and decided they must seek advice. They knew that the majority wanted to be independent of any outside organization. There had been talk all through the shop. They read the papers and found there was a "lot of labor trouble in different places." Different groups got together and talked and the representatives gained the impression that the members wanted an independent union (R. 277-8).

A lawyer's name was suggested to the representatives by the management at the above conference. However, they did not go to him but to a lawyer whom they had heard of in connection with the Independent Union of Craftsmen in the Chicago plants of the Link-Belt Company (R. 278). (See *Independent Union of Craftsmen* v. *N. L. R. B. and Link-Belt Company*, 110 Fed. 2nd 506 C. C. A. 7th C.)

The representatives went to this attorney's office on Saturday, May 8th, to seek legal advice. At that meeting a constitution was drawn (Board's Exhibit 12). Also a form of application for membership was prepared (R. 278).

It was easy to obtain members. As Julius Heberlein testified:

> "There were rumors through the shop that we were organizing an Independent Union. * * * I explained that our Union (meaning old N. R. A. union) was no good. * * * They were willing to sign."

This explains why he was able to obtain almost a whole sheet of signatures in two departments at noon during the lunch hour (R. 464).

On May 10th, 11th and 12th members were obtained in the Independent Union. A total of 210 signatures were obtained which was more than a majority. The following afternoon, May 13th, after the day shift, a meeting was

held at Workmen's Hall, 51st and Whipple Streets. A constitution and by-laws were adopted. The attorney was present and explained these documents and the National Labor Relations Act, and temporary officers and committeemen were elected (R. 278-80). Not all of these were N. R. A. committeemen. Shaffron, the first Secretary and Treasurer, had never been an N. R. A. committeeman (R. 277). Shortly after the first meeting an election was held for permanent officers and committeemen. Vernon Miller was elected Vice President and Shaffron Secretary and Treasurer (R. 324). Miller had never been an N. R. A. committeeman.

The attorney for the Independent prepared a recognition agreement (Board's Exhibit 13) which was signed by the company on May 14th, after the membership applications had been thoroughly checked by the management and Egner had signed a certificate as to the number of members (Board's Exhibit 15; R. 280-3).

There were then 210 members. At that time there were around 275 or 300 employed in the shop (R. 282) and not more than 74 in the office (R. 125). This, however, includes a number of supervisory employees and it was claimed by the C. I. O. that there were only 54 office employees eligible to join that union (R. 124).

Thereafter, by a series of negotiations, a basic bargaining agreement relating to wages, hours of employment, and other conditions of employment was entered into and signed by the Independent and the Company on May 28, 1937 (Intervener's Ex. No. 2; R. 654).

On June 10, 1937, the Independent was incorporated under the laws of the State of Illinois (R. 323, 940). Prior to and after the date of incorporation a substantial majority of the so-called office workers joined the Independent.

It is significant that of the three directors of the cor-

poration two of them had never been committeemen under the N. R. A. union: namely, Martin Bodie and Vernon Miller (R. 892). The organizing committee was in part displaced at the first election and after the incorporation continued only as a grievance committee (R. 892). Thus, the alleged influence of the committeemen under the N. R. A. union became inconsequential.

The number of members of the Independent had by this time increased to approximately 275 (Intervener's Ex. 4, 5a and 5b).

2. **The legal form of the Independent Union of Gear Workers.**

The Independent Union of Gear Workers was incorporated June 10, 1937, under the laws of the State of Illinois. Its objects are set forth in the Charter (Intervener's Ex. 1). Object (d) is as follows:

> "To establish a labor union which may be designated or selected by the employees of said plant, or of any appropriate unit thereof, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment and which shall aid its members in every lawful manner."

A temporary paper constitution and by-laws were adopted at the first meeting May 13, 1937 (R. 280; Board's Ex. 12 contains a copy of the constitution and also of the by-laws which were adopted after incorporation).

The by-laws of the corporation deal with membership applications, meetings, quorum, discipline, initiation fees, dues, committeemen, officers, board of directors, collective bargaining and amendments (Board's Ex. 12).

3. **The Independent Union as a business enterprise.**

The Independent Union of Gear Workers keeps minute books and account books. The books and records including its minutes and the records of income and disbursements were produced at the hearing and were found to be regular in every respect (R. 361-3, 408, 431-6).

The Independent Union has a checking account at Chicago City Bank and Trust Company. It collects dues of 50 cents per month. A regular accounting procedure is followed in its money matters. $799 had been collected to the time of hearing. $300 had been paid to the attorney for the Independent up to the time of hearing and other necessary bills have been paid and the Independent had $184.60 in the bank not subject to outstanding checks (R. 324, 408). The Union paid its **attorney an additional $200, making a total of $500 up to the time of filing of the Intervener's exceptions.** It had **agreed to pay an additional amount** for services before the Labor Board and elsewhere (R. 907).

Independent has rented and paid for the use of a hall and all other expenses incidental and necessary to its operation. It has held regular meetings and kept minutes of them (R. 361-2).

It has also carried on extensive bargaining with the Company as will be seen in Section 4 following.

4. **Collective bargaining between the Independent Union of Gear Workers and the Company.**

Meetings were held to negotiate a basic agreement governing wages, hours and other conditions of employment. Attention is particularly called to Intervener's Exhibits 6 and 7 (R. 659, 663) respectively. These should be compared with Intervener's Exhibit 2—the final contract (R. 654). Exhibits 6 and 7 are some of the preliminary drafts

prepared by the Independent's attorney as a basis for the preliminary discussions and show some of the demands made by the Independent which were not acceded to or were only acceded to by the Company reluctantly.

Thus it will be seen from Section 2 of Exhibit 6 that a closed shop was demanded and rejected; from Section 3 that a check-off was demanded and rejected and later agreed to in Intervener's Exhibit 2; that in Section 4 the demand was made that a study be conducted looking to a profit sharing arrangement, that this was at first rejected but appears again in modified form in Section 4 of Exhibit 2; and that a number of other important advantages were strongly urged and finally obtained by the Independent.

Collective bargaining conferences have been held once a week or once every two weeks since the signing of said agreement (R. 325).

After a series of negotiations a wage increase of 5 cents an hour for the shop workers and of 5 per cent for the office workers was obtained and, in addition, a minimum wage was established at 55 cents per hour (R. 325).

In addition, many individual grievances have been settled between the representatives of the Union and the Company. Examples of these are lay-offs, Saturday work and night work (R. 325).

Improved lighting has been obtained for the night gang. New lights have been put on the machines. In the office new lamps have been put on every desk. A storm door has been installed to keep a draft from blowing on the office employees. New glass has been put in the windows throughout the shop. A damper has been put on the ventilating shaft (R. 325).

An important item for all the members of the Independent was the negotiation of the proper method of

rotating work when work began to get slack. A method was worked out whereby each worker would be laid off three or four days and then would return to work for a few days (R. 325-6).

In addition, the Independent has a committee on vacations and a committee on wages (R. 326).

In addition, a revision of the bonus system is under discussion (R. 423).

The method of rotation in the order department for Saturday work was taken up with the management in behalf of office employees with the result that the Saturday work was discontinued (R. 423).

The Independent stands ready to handle individual grievances with the management (R. 424-5).

As the hearing commenced January 10, 1938, evidence of further negotiations does not appear in the record.

II.

Unimportant Circumstances on Which Board Predicates Findings of Domination, Interference and Support:

1. Independent formed when old N. R. A. union abandoned.

As pointed out in Section I 1 above, the only connection between the old N. R. A. union and the Independent is that the Independent Union was formed at the time it became necessary to dissolve the old N. R. A. Union or Plan. On April 12, 1937, the United States Supreme Court held that the National Labor Relations Act applied to manufacturing concerns engaged in interstate commerce. Since the N. R. A. Union made all employees belong to the Plan automatically without dues, and provided for the Company to defray the Plan's necessary expenses, it was obviously illegal and was properly dissolved. The em-

ployees were free under the National Labor Relations Act to form and join a union of their own choosing. A majority chose to form and join the Independent. Since there were a large number of N. R. A. unions of this type throughout the country, the Labor Board's argument would prevent the formation of Independent unions in those plants. This would emasculate the plain terms of the Act which provides that employees may form and join any union they choose.

2. **Solicitation on Company time.**

This was not done to any considerable extent by the Independent, was not done with the consent of the Company, and was done to an equal extent at least by the C. I. O. and the S. T. B. and A.[1]

Thus Egner's testimony (R. 278-9) is that he worked at his job a good part of the three days of solicitation. He would "spend five minutes here and there" getting signatures from the men during the noon hour. Such signatures as he obtained during working hours were out of sight of the foreman and were not right out in the open.

1. Instances of C. I. O. and A. F. of L. solicitation on company time are as follows:

Adolph Matoska approached Louis Martin during working hours and asked him to come to the C. I. O. meetings. Matoska was seen talking to other employees during working hours (R. 437).

L. W. Murray was solicited to join the Stenographers and Typists Union during working hours by George Sivertsen (R. 440).

S. B. Rice took Edward Miller's application for membership in the Stenographers and Typists Union during working hours (R. 448).

Raymond L. Hartmann solicited the membership in the C. I. O. of Thomas C. Andrews during working hours (R. 457).

Wilbur McDade obtained the application of James F. Weber in the Stenographers and Typists Union during working hours (R. 467).

Arthur Nendick was solicited for membership in the C. I. O. by Adolph Matoska during working hours. Nendick was also solicited by other members of the C. I. O. during working hours (R. 499-502).

The partiality of the Trial Examiner in favor of the C. I. O. and his prejudice against the Independent is shown by the statement on page 499 of the record:

> "I must sustain the objection. I just explained to you off the record that I don't think a showing that there was other union activity in the plant would in any way condone the activity by the Independent or in any way refute the charge that the respondent had fostered or promoted the Independent."

Heberlien testified that he obtained his signatures at the lunch hour. During working hours he did not approach anyone but at times employees in his department would approach him to sign the application. This was because rumors had spread throughout the shop that an independent union was being organized. "Most of them come to me * * *. **They were willing to sign.**"

The Board's statement (R. 934) concerning Superintendent Mackman having been advised that Egner was organizing for the Independent means nothing more nor less than that the members of a rival union were carrying tales out of school. Egner has explained his part in this matter, as stated above. Other members of the Independent's organizing committee likewise explained their method of solicitation.

The Board in its decision (R. 934) finds difficulty in accounting for the rapidity with which the signatures were obtained. This difficulty is explained by the fact, as stated by Heberlein, that the men were **"willing to sign."** As admitted by Matoska (R. 196) the men had been debating the various forms of unionization ever since the N. R. A. days and were familiar with the various organizations. As stated by Egner:

> "There had been talk all through the shop; we, like everybody else, read the papers, found out there was a lot of labor trouble in different places, and different groups get together and talk and we thought the thing to do was to be by ourselves." (R. 278.)

Heberlein's statement that the men were "willing to sign" is a masterpiece of understatement as obviously the men were anxious to belong to an independent union.

3. **The check-off.**

The Board in its decision (R. 941) says:

> "With respect to the check-off, while **ordinarily** it is a **legitimate** method of collecting union dues, here it was a device participated in by the respondent

whereby continued financial means was assured a company-sponsored and supported labor organization."

There is little need to amplify this statement by the Board. As is admitted by the Board, the check-off is "ordinarily" considered a "legitimate method of collecting union dues." It is well known that the Coal Miners Union, which is the backbone of the C. I. O. organization, has had the check-off for years. Many coal miners feel that it is an imposition and a device to perpetuate the Union. However, there is a material difference between the check-off of the Independent and that employed by the C. I. O. in that the Independent has never collected more than 50 cents per month and has never at any time collected assessments and fines by the check-off.

It will be noted from a comparison of Intervener's Exhibits 6, 7 and 2—various drafts of the basic agreement—that Section 3 was only obtained after much bargaining. It was one of the "must" provisions insisted upon by the Independent. However, the Independent failed to obtain the closed shop (R. 659).

III.

The Appropriate Bargaining Unit.

The Board in its decision (R. 944) finds that the office and clerical employees of the respondent at its Chicago plant, excluding managers, draftsmen, outside salesmen and supervisors constituted a unit appropriate "for collective bargaining."

By this ancient method of gerrymandering the unit, the Board finds that there were 53 employees eligible to join the Union and that the S. T. B. A. with its 33 cards had a majority in May, 1937 (R. 944).

The Trial Examiner and the Board found themselves

stymied, however, by the fact that the S. T. B. A. was ousted from the A. F. of L. early in June, 1937, and coasted along as an independent organization under the name of Chicago Office Workers Union until July 20, 1937, when it was chartered by the C. I. O. as the U. O. P. W. (R. 947). The C. I. O. Union claimed it was entitled to be considered the same as the old S. T. B. A. The Board was unable to make this finding, however, because of the irrefutable evidence introduced by the Independent (R. 947-8; see also testimony of Miller, Murray, Kluka, Weber, Young, Fisli, Bodie, Buxton, Schneider, Braun, Andrews and Dahl). Several of these office employees testified that they had joined the S. T. B. A. but that they had never had any idea of belonging to the C. I. O. and had not even been notified of the change let alone consented to it (R. 882; see Intervener's Exceptions for a summary of this point).

The reason for the unit assigned by the Board breaks down by the **exclusion of engineers and draftsmen.** They are paid a salary on the same basis as other office employees and are a part of the office force. **The true reason for this omission was given by Board's witness Slotkin, C. I. O. organizer, namely, that the A. F. of L. and C. I. O. have a separate union for such employees** (R. 111). This may be a sufficient reason for professional labor organizers but is not a valid reason for overruling the wishes of a majority of the office workers who are now members of the Independent.

A list of the members of the Independent other than engineers and draftsmen, and also a list of the engineers and draftsmen, appear on page 884 of the record. There are 11 engineers and draftsmen and 29 office workers other than engineers and draftsmen belonging to the Independent.

The 12 office employees, named above, testified that

they want the same union to represent them which represents the shop. The reason given was that it would be a **more powerful** union.

Thus, at page 409 of the record, Bodie testified:

> "So that later, when there was an opportunity to weld the two units together I was for it. It is a more powerful unit if they can act together. If you have them separate I have always claimed **they would be sunk**; the office particularly, not the shop. The shop always was able to take care of itself but never the office. I doubt whether they could bargain as effectively even if there were no trouble."

This point was illustrated by Mr. Bodie in his testimony. He stated that the reason the office workers got a raise in salary was because the shop workers' wages had been increased. He stated:

> "I used the fact that the shop had already gotten a raise. That clinched the argument." (R. 416.)

IV.

Petitioner's Criticism of the Court Below Is Immaterial and Unfair.

Petitioner attempts to incorporate by reference its allegations concerning the Court below contained in its petition for writs of certiorari in the Link-Belt cases (Nos. 235 and 236), and demonstrates its own technique of first making an assertion and then considering it proved thereafter by its statement on page 19 of its instant petition that the Court below continues "to apply the technique of review described in our petition in the Link-Belt cases," and then concludes on page 25 "that effective enforcement of the Act in the Seventh Circuit is in substantial jeopardy." This reminds of Cato the Elder's famous reiteration, "Delenda est Carthago." Let us hope that the beneficial labor Act is not destroyed, like ancient Rome, for lack of constructive statesmanship. The expertise of the Labor Board is already seriously questioned.

The Board's analysis of all Labor Board cases reviewed by the Court below was fully answered in the briefs of the respondent company and the Independent Union of Craftsmen in the Link-Belt cases.

V.

The Motion to Reverse Without Oral Argument.

This motion is based on the supposed error of the Court below in permitting a "summary" of the evidence to be printed by the respondent company and to be used as a basis for the oral argument and opinion of the Court. Without attempting to follow the obscure reasoning of the Petitioner, we point out that the **Labor Board stipulated with the Independent that the summary "shall stand as the record of the proceedings before said Board in this case"** (Petitioner's Record, p. 1051—stipulation signed by Labor Board).

Conclusion.

No new point of law is presented by this case and the decision of the court below is not in conflict with decisions by other circuit courts. The facts in each case must be considered separately and the discussions of facts in one case cannot be considered rules of law binding another court treating a different set of facts.

The court, in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, said (page 270):

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union * * * even though it had ordered the employer to cease unfair labor practices."

No evidence was introduced at the hearing of domination during the year following organization and preceding the hearing but the undisputed evidence shows affirmatively that during this latter period the Independent was a strong vigorous representative of the employees. And this situation has carried on for two and one-half years since the hearing.

In *National Labor Relations Board* v. *Jones-Laughlin, Inc.*, 301 U. S. 1, this court stated (page 33):

> "Thus in its present application the statute goes no further than to safeguard the right of employees to self organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer."

The court below has prevented an injustice by holding that the evidence could not support the conclusion that the Independent is dominated by the employer, and has assured to the members of the Independent the rights guaranteed them by the National Labor Relations Act.

We therefore respectfully submit that the Petition for Writ of Certiorari should be denied.

BENJAMIN WHAM,
Attorney for Respondent.

November 22, 1940.